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No. 87-113

(2)

In The
Supreme Court of the United States
October Term, 1986

DIANE HERCEG and ANDY VINES,
Petitioners,

vs.

HUSTLER MAGAZINE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit correctly applied the test of *Brandenburg v. Ohio* and *Hess v. Indiana* and correctly determined that *Hustler's* article "Orgasm of Death" did not constitute an "incitement"?

2. Whether the Court of Appeals for the Fifth Circuit correctly determined that the test for incitement set forth in *Brandenburg v. Ohio* and *Hess v. Indiana* was the proper standard for review of the trial court's judgment?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs/Petitioners: Diane Herceg
Andy Vines

Defendant/Respondent: Hustler Magazine, Inc.

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REFERENCE TO OPINIONS

The United States District Court for the Southern District of Texas issued four opinions in the course of this litigation. The opinion granting Respondent's Rule 12 Motion, but granting Petitioner leave to amend is published at 565 F.Supp. 802. The opinion denying Respondent's renewed Rule 12 Motion is published at 583 F.Supp.

1566. The opinion granting Respondent's Motion for Summary Judgment, in part and denying it in part, is unpublished and is reproduced at Appendix B-1 in the petition filed with the Court by Petitioners. The opinion denying Respondent's Motions for Judgment Notwithstanding the Verdict and for a New Trial is unpublished and is reproduced as Appendix B-2 to the Petition for Writ of Certiorari.

The opinion of the United States Court of Appeals for the Fifth Circuit, dated April 20, 1987, is reported at 814 F.2d 1017, and is reproduced at Appendix A in the petition filed with the Court by Petitioners.

JURISDICTION

The Judgment for the Court of Appeals for the Fifth Circuit was entered on April 20, 1987. No Motion for Rehearing was filed.

Petitioners allege that jurisdiction of this Court is based upon 28 U.S.C., Section 1254(1).

STATEMENT OF THE CASE

The opinion of the Court of Appeals correctly states the relevant facts.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals correctly applied the test for incitement set forth in Brandenburg v. Ohio and Hess v. Indiana and correctly determined that the Hustler article "Orgasm of Death" did not meet the test for incitement.

A. The Court of Appeals correctly applied the test for incitement as set forth in Brandenburg v. Ohio and Hess v. Indiana.

The Court of Appeals correctly reviewed the judgment of the district court by applying the test for incitement set forth in *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) and explained in *Hess v. Indiana,* 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973). Petitioners tried their case on the theory that the article was unprotected speech because it fell within the "incitement" exception to First Amendment protection. Petitioners do not allege that the article is untrue, defamatory or obscene. The sole unredeeming attribute of the article, according to Petitioners, is its discussion of a dangerous sexual practice. In this context, the Court of Appeals was correct in turning to this Court's previous opinions defining incitement to determine whether Petitioners met their burden of establishing lack of First Amendment protection.[1] Its cor-

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[1]Respondent agrees with the Court of Appeals' assessment that "the district court's effort to apply the *Brandenburg* analysis to the type of 'incitement' with which *Hustler* was charged appears inappropriate." 814 F.2d at 1023. The concerns underlying the development of the "incitement" exception to First

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rect application of that approach counsels denial of the petition for certiorari.

In *Brandenburg* a Ku Klux Klan leader challenged his conviction under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" by his appearance, in Klan regalia, at an organizer's meeting and his comments at that meeting, including his statement that:

> We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken.

Even though the wording of the statute under which Brandenburg was convicted essentially tracked the wording of a California statute upheld earlier in *Whitney v. California,* 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927), this Court held the Ohio statute unconstitutional. It declared that *Whitney* had been discredited by later decisions, and that:

> These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except

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Amendment protection are not present in this case. Nevertheless, Petitioners, apparently recognizing that pure speech could not constitutionally be punished, attempted to pigeonhole the article into a recognized exception to First Amendment protection. Because the judgment of the district court was based on a finding that the article constituted an "incitement," the Court of Appeals' review of the article in terms of the *Brandenburg* test was necessary and proper.

> where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

395 U.S. at 447.

In *Hess v. Indiana,* 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed. 2d 303 (1973), the Supreme Court reversed Hess's conviction, holding that his words did not constitute an incitement. Hess was involved in an antiwar demonstration on the campus of Indiana University, and in the course of the demonstration between 100 and 150 demonstrators blocked traffic in the streets. The sheriff and his deputies began clearing the streets and it was alleged that as Hess was leaving he said, "We'll take the fucking street later," or "We'll take the fucking street again." He was arrested. 414 U.S. at 106-07.

This Court reviewed Hess's speech and found it did not meet the requirements of incitement. Witnesses reported that Hess was not exhorting the crowd to go back into the street, he was facing the crowd not the street when he spoke, he did not direct his comments to a particular person or group, and that his tone, although loud, was no louder than that of others in the area. 414 U.S. at 107. The Court held that at worst Hess's statement "amounted to nothing more than advocacy of illegal action at some indefinite future time." 414 U.S. at 108. It also noted that the evidence:

> showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State

> on the ground that they had "a 'tendency to lead to violence'."

414 U.S. at 108-109 (emphasis in original) (citations omitted).

Although certainly not binding on this Court, the fact that the Court of Appeals' opinion was consistent with that of other courts that have faced the issue shows the law is developing in an orderly and predictable fashion such that this Court need not give any direction. *See De Filippo v. NBC,* 446 A.2d 1036 (R.I. Sup.Ct. 1982) (imitation of hanging stunt leading to accidental death not actionable); *Olivia N. v. NBC,* 126 Cal.App.3d 488, 178 Cal. Rptr. 888 (1981) (imitation of television depiction of sexual assault with broomstick not actionable). For example, the Court of Appeals' approach was the same as that of the Rhode Island Supreme Court when it faced very similar issues in *DeFilippo v. NBC,* 446 A.2d 1036 (R.I. Sup. Ct. 1982).

DeFilippo arose out of the death of a thirteen-year-old boy, who had been watching an episode of "The Tonight Show" with Johnny Carson that included an interview with a professional stuntman. As part of his appearance the stuntman was to "hang" Johnny Carson. Before he did so he pointed out that this was not something that someone should try and that people had tried this and been seriously hurt. After he and Carson engaged in a comic dialogue, the stuntman "hanged" Carson, to no injury to Carson. Several hours after the broadcast the DeFilippos found their son Nicky hanging from a noose in front of the television set, which was still tuned to the NBC station upon which "The Tonight Show" appeared. Plaintiffs claimed that their son had been watching the show,

had attempted the stunt, and had accidentally hung himself.

The Rhode Island Supreme Court, after rejecting the DeFilippos' negligence claim, turned to whether the broadcast fell into an area of unprotected speech—in this instance whether is constituted incitement. In doing so, it applied the *Brandenburg* test and rejected the incitement claim. The Court of Appeals' similar use of *Brandenburg* and *Hess* bespeaks an orderly development in this area of the law.

The Court of Appeals' adaptation of the *Brandenburg-Hess* standard to this case provided a useful framework in analyzing the elements of proof for incitement in a civil action. It ruled that the plaintiff had to show:

1. Autoerotic asphyxiation is a lawless act.
2. *Hustler* advocated this act.
3. *Hustler's* publication went even beyond 'mere advocacy' and amounted to incitement.
4. The incitement was directed to imminent action.

814 F.2d at 1022. This test is a helpful and accurate one that this Court need not disturb. The Court of Appeals, applying this test, correctly found that the article did not advocate the practice or constitute an incitement to imminent lawless action.

B. The Court of Appeals correctly held that no fair reading of the article could make its content advocacy to engage in the practice of autoerotic asphyxiation.

The Court of Appeals correctly found that the article did not advocate[2] autoerotic asphyxiation. Any fair reading of the article will reveal it for what is is: an educational piece about a dangerous sexual practice. A copy of the article is attached to this brief as Appendix A.

The article appears in a regular segment of *Hustler* called SEXPLAY, which includes a paragraph introducing the series of articles[3]. The article is headed with an "Editor's Note":

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[2]Petitioners' argument that *Brandenburg* does not require advocacy to support an incitement claim is patently without merit. The First Amendment does not allow punishment of the abstract expression of ideas, even dangerous or offensive ideas. The incitement exception to First Amendment protection derives from concern about the calculated effect certain kinds of speech have on people. To constitute unprotected incitement, the words must go beyond mere expression or discussion and be of such a character and nature that they urge, encourage, exhort, or advocate. This Court's decision in *Hess* made clear that for incitement, the speaker must advocate the conduct involved. 414 U.S. at 108-109. Justice Rehnquist's dissent in *Hess* even recognized that the words at issue had to be characterized as "an exhortation" before they could be punished. *Id.* at 111. Indeed, in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), one of the reasons the Court was troubled by the speech was that it could be construed as advocating violence. 458 U.S. at 926-928.

[3]The standard editorial introduction to the SEXPLAY series stated in part: "We present this series of informative articles to increase your sexual knowledge, to lessen your inhibitions and—ultimately—to make you a much better lover." This introduction plainly prefaces a series of articles designed to make

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Editor's Note: *HUSTLER* emphasizes the often-fatal dangers of the practice of "auto-erotic asphyxia," and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose.

The article begins by describing the death of a teenager, "Bobby L.," by hanging while masturbating. It says that "Bobby's method of masturbation was neither healthy nor harmless." The article describes the practice of cutting off the air supply to increase sexual excitement and points out that sometimes the practitioner "never comes out of it." It then discusses the number of deaths that have occurred as a result of the practice and an article on the practice that appeared in the *Journal of Child Psychiatry*.

The article then describes the real danger of the practice as the belief that asphyxia can be controlled. It calls this belief a "critical error" and notes that the baroceptor reflex may result from too much pressure on the neck, causing the flow of blood to the brain to halt, leading to rapid unconsciousness. The unconscious practitioner then falls on the noose and hangs.

The article goes on to discuss other examples of those who engaged in this practice. It describes the lifestyle and

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readers better lovers, and educating readers on being better lovers is as much telling them what not to do as telling what to do. The article telling readers not to attempt autoerotic asphyxia and to watch for signs of the practice in friends or relatives so they can be helped is consistent with the introduction and with the purpose of the SEXPLAY section.

death by hanging of Vaughn Bode, a cartoonist, characterizing his efforts at pursuing "quick and dangerous highs" as a "form of spiritual Russian roulette." It then describes an unnamed 15-year-old male's habit and notes that it was discovered early enough that a psychiatrist could arrange for psychotherapy sessions to alter "his destructive behavior."

The article discusses the relationship between hanging and erotic bondage, relying upon observations by psychotherapists, sex researchers, a psychiatrist, and a study of the relationship between bondage and suicide. Then the article contrasts the awareness of the danger of death in the practice between adults and teenagers, noting that adults realize they are flirting with death but that "teenagers may think it's just a cheap high that won't harm them any more than a ride in a fast car."

The article ends as it began, with a warning:

> It's a fact: People practicing this form of sexual stimulation *do* kill themselves. Recognizing the syndrome early is one way to stop a friend or relative before he or she takes the ultimate one-way trip. But it is also important to know—beyond a doubt—that auto-asphyxiation is one form of sex play you try only if you're anxious to wind up in cold storage, with a coroner's tag on your big toe.

An article that begins "DO NOT ATTEMPT this method," that describes its practitioners as mentally ill, and that says you try this form of sex play only if you want to die simply does not advocate that people engage in the practice. In fact, the only reasonable interpretation of the article is that it does the opposite of advocate—it disapproves of and opposes the practice.

Even if the numerous warnings in the article are ignored, at most the article merely describes the availability of a sexual practice.[4] In that respect it resembles the contraceptive advertisements involved in *Carey v. Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). When faced with the claim that the contraceptive advertisements legitimized illicit sexual behavior, the Court pointed out that the advertisements for contraceptives could not even remotely be characterized as incitement—they merely stated the availability of legal and constitutionally protected products and services. 431 U.S. at 701. Here, as in *Carey,* the Court of Appeals rightly concluded that the mere description of the practice was constitutionally protected and did not meet the requirements for incitement.

It is hard to imagine how *Hustler* could have written the article in any more effective way to educate its readers on the dangers of the practice. As the Court of Appeals recognized, if this was advocating the practice, then virtually any description of a dangerous practice accompanied by warnings not to perform the practice could be considered advocacy. The Court of Appeals correctly chose to judge *Hustler* by the words it published, not by some innuendo or strained meaning of the article 180 degrees opposite from what *Hustler* said.

The *DeFilippo* holding bears here. In *DeFilippo* the Rhode Island Supreme Court recognized that when the

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[4]Although the Court of Appeals did not consider the issue, the practice described in the article was not an illegal act, as required by *Brandenburg* and *Hess.* This is yet another reason why the article did not meet the test of incitement.

broadcast stressed the dangers of performing the stunt, the broadcast lost any incitement character it might have had. The basis for that decision necessarily must have been that the warnings made it clear that the broadcaster was not advocating emulation of the practice. *See* 446 A.2d at 1041. Similarly, when *Hustler* repeatedly warned against the practice of auto-erotic asphyxia, the Court of Appeals was correct in saying that "no fair reading of it [the article] can make its content advocacy, let alone incitement to engage in the practice." 814 F.2d at 1023.

C. The article does not advocate imminent action and could not create culpable incitement to imminent action unprotected by the First Amendment.

The Court of Appeals correctly observed that a finding of incitement was inappropriate for written material. It noted that "[t]he root of incitement theory appears to have been grounded in concern over crowd behavior." 814 F.2d at 1023. Written materials are in an entirely different context—they lack that sense of intimacy, interaction and power that can develop in a personal address to a large group of people well-recognized in our political and social history—that seriously argues that written materials could never meet the test for incitement to imminent action. *See, e.g., Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941) (editorials complaining of judicial action did not pose danger of extremely serious substantive evil of improper influence of judicial action nor an extremely high imminence of such evil, requiring contempt citations for out-of-court publications to be set aside). But the Court of Appeals did not reach the question, correctly find-

ing instead that any advocacy in the article was not directed to imminent action.

First, the words in the article do not say "do it now"; they do not call for imminent action. The reasonable reading of the words in the article is "don't ever do it or you will probably die." Even plaintiffs' witnesses testified that the article contained no explicit or overt encouragement of the practice. The lesson of *Brandenburg* and particularly of *Hess* is that the words must call for action *now*. Here, as in *Hess v. Indiana*, 414 U.S. 105 (1973), "At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time." 414 U.S. at 108. *See also Noto v. United States*, 367 U.S. 290, 297-298, 81 S.Ct. 1517, 6 L.Ed.2d 836 (1961) (speech merely teaching moral propriety of violence for change not punishable; substantial evidence of a present call to violence needed). Similarly, discussing the practice of auto-erotic asphyxia, even implicitly describing it as desirable, does not meet the imminence requirement for incitement.

Second, just because one person may have acted after reading the article does not justify, without more, after the fact punishment of the speaker for alleged incitement to imminent action. This is the lesson of *Cox v. Louisiana*, 379 U.S. 536, 550-51, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965) and *Cohen v. California*, 403 U.S. 15, 23, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). For example, in *Cohen* the State argued that it was entitled to prosecute Cohen for wearing his jacket with "Fuck the draft" on the back into the courthouse because others might react adversely to that com-

ment and create a disturbance. This Court rejected that argument, classifying it as a "self-defeating proposition" that the State could increase its role as a censor because others might take violent offense at the remarks of a speaker who has not sought to provoke such a response. 403 U.S. at 23. The Court of Appeals properly held that the fear that some unfortunate individuals might misread an article and ignore its warnings does not justify stripping the article of constitutional protection.

Finally, Petitioners seemed to argue that the article made the practice appear attractive to teenagers and thus incited imminent action. But the Court of Appeals recognized that making a practice appear attractive is a far cry from incitement to imminent action. The New York Education Department's Motion Picture Division made claims similar to those here when it denied a license to the film "Lady Chatterley's Lover" because it presented adultery as a desirable, acceptable and proper pattern of behavior. In *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (1959), this Court struck down that denial, recognizing that,

> What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas.

360 U.S. at 688. The Court rejected the argument that the State's action was justified because the movie attractively portrayed illegal and immoral conduct. The Court said:

> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the

> religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

360 U.S. at 688-89. In the same way the Court of Appeals properly rejected Petitioners' claim of incitement, as should this Court.

II. The Court of Appeals correctly determined that the trial court's judgment could not be upheld on a less stringent negligence standard.

A. The court of Appeals correctly found that Petitioners did not preserve any negligence claim.

The Court of Appeals correctly held that Petitioners did not preserve error and thus waived their argument that the Court reject the years of constitutional development of this issue since *Brandenburg* and create a new category of speech that falls outside of constitutional protection. Petitioners did not object to the submission of the charge on the incitement issue, they did not urge submission of other issues, they attempted to enlarge their rights on the appeal, and they did not give notice of appeal on this issue.[5] The failure to preserve this issue means that this ground is not a proper one upon which to grant a petition for certiorari.

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[5]Petitioners did give notice of appeal, but only on the issue of prejudgment interest. (R.A. 38)

Petitioners waived the argument advanced in their Petition for Writ of Certiorari in which they urge that the test of incitement should not apply in this case and that the defendant's conduct should be measured by a negligence standard. Petitioners did not try a negligence case in the district court. The district court granted defendant's motion to dismiss the allegations of negligent publication, and plaintiffs did not present evidence of negligence or pursue a cross-appeal. It is well-settled that an appellee may not attack a judgment with a view of enlarging his own rights. *United States v. American Railway Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 564, 68 L.Ed. 1087 (1924). It is equally well-settled that, although an appellee may, without taking a cross-appeal, urge an argument in support of the judgment that was not relied upon by the district court, the argument must be supported by the record. *See id.; Hoyt R. Matise Co. v. Zurn*, 754 F.2d 560, 565 n.5 (5th Cir. 1985).

The legal and factual findings necessary to support a judgment of negligence do not appear in the record. Issues concerning the existence and nature of a duty and whether the duty was breached were not tried and were not presented to the judge or the jury for decision. Further, Petitioners neither objected to the charge nor submitted proposed negligence issues to the district court.

Finally, Petitioners seek to enlarge their rights and are not entitled to do so without pursuing a cross-appeal. They abandoned their negligent publication claim in the district court by failing to present evidence of negligence and by failing to object to the charge. Petitioners may not urge a theory of recovery on appeal when they did not try their suit on that theory nor introduce evidence in support of the theory below. *See, Green v. Edmands Co.*, 639 F.2d

286, 288 (5th Cir. 1981); *Dees v. W. M. Webb, Inc.*, 590 F.2d 144, 146 (5th Cir. 1979). This case is not an appropriate one to review these issues.

B. The Court of Appeals correctly rejected the claim that a less stringent standard for applying First Amendment protections should be used in cases involving non-political speech that has actually caused harm.

Even on the merits, Petitioners ask the Court to grant the writ so that it can undo much of the development of First Amendment protection for the freedom of speech in the last 50 years. They urge this Court to abandon its precedents controlling this area and create a new category of unprotected speech for "non-political" speech that might involve the "physical and psychological well-being of a minor" under which *Hustler* and others would be liable for negligent creation of a clear and present danger of spurring action that causes severe personal injuries or death. In essence, if any form of truthful, non-defamatory speech short of political rhetoric results in injuries to a minor, the speaker could be held liable. The Court should reject this dangerous and unnecessary invitation to start judging the relative value of speech on social issues.

Petitioners try to draw an analogy to libel cases as a ground for establishing their new category of unprotected speech, but this is unpersuasive because Petitioners have ignored the fundamental distinction between the issues involved in a libel case and those involved in this case. In libel cases, this Court has struggled with the limits of constitutional protection for *false* speech injurious to reputation in order to preserve the larger First Amendment

interest in promoting speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Here, no false speech injurious to reputation is involved. This Court's analysis of libel law and the First Amendment has focused on when speech that was once presumed unprotected should be protected. Petitioners want this Court to take protected speech and make it unprotected. Petitioners' libel analogy is thus fatally flawed.

Petitioners then argue that because the article appears in a magazine like *Hustler* and does not involve political matters, and because their action is a civil claim instead of a criminal action, the *Brandenburg* test for incitement should be relaxed. This Court's precedents offer no support for these arguments.

Petitioners, joined by the *amicus curiae,* argue that even though the August 1981 issue of *Hustler* is not constitutionally obscene, this article is not entitled to the full protection of the First Amendment because of the contents of the rest of the magazine. The record does not support the Petitioners or the *amicus curiae's* reliance on the other contents of *Hustler* because the only portion of the August 1981 issue of *Hustler* that was admitted into evidence was the article at issue. That is the only evidence properly considered on the nature of the speech involved.

Moreover, even if in evidence, the unrelated contents of *Hustler* cannot serve as a basis for decision. In essence, Petitioners and *amicus curiae* are saying that the article was not a problem in *Vanity Fair,* a magazine that later published a similar article, but it is a problem in *Hustler,* a sexually provocative magazine. This is analogous to

the Village of Skokie's argument that the American Nazi Party could be denied a parade permit because "in the place of Skokie, in these times, *given the content of appellees' views and symbols,* the demonstration and its symbols and speech should be prohibited." *Collin v. Smith,* 578 F.2d 1197, 1201-02 (7th Cir.) *cert. denied,* 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978). The Seventh Circuit refused to authorize such restrictions, which turned on the content of the demonstration, and declared the ordinance restricting the American Nazi march unconstitutional. *See also American Booksellers Ass'n, Inc. v. Hudnut,* 771 F.2d 323 (7th Cir. 1985); *aff'd,* 106 S.Ct. 1172 (1986) (Ordinance restricting sale of "pornography," defined as "graphic sexually explicit subordination of women" was unconstitutional content-related restriction of speech; any balance between value of speech and costs of restriction concerns *categories* of speech (obscenity, fighting words), not the *content* of particular works).

A holding that the article at issue is not protected by the First Amendment because of the unrelated contents of the magazine would violate *Hustler's* constitutional rights of free expression and freedom to choose what to include in its magazine. Such a holding would in essence tell *Hustler* that as long as it persists in publishing its other contents, it cannot discuss serious matters such as the dangerous practice of auto-erotic asphyxia. This cannot be allowed, for "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). In-

citement based on *Hustler's* unrelated contents violates this maxim and cannot be allowed.

Petitioners also urge that the contents of the article itself do not deserve protection because of their "near-obscenity." The article has already been outlined, and it is appended to this brief. A review of the article reveals it as a serious discussion of a dangerous and disturbing sexual practice and a larger social problem, especially among teenagers. The evidence was that this article was adapted from an article published by a psychiatrist in the *Journal of Child Psychiatry* and that a similar article discussing this practice later appeared in *Vanity Fair* magazine. It is not too difficult to imagine that a similar article could appear in sexual advice columns syndicated in newspapers throughout the United States. This is clearly protected speech.

Freedom of speech is not limited to political expression or comment on public affairs. *Time Inc. v. Hill,* 385 U.S. 374, 388, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). Free speech must "embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama,* 310 U.S. 88, 102, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). This includes matters of science, morality, and arts in general. *Id.* Protection does not depend on the value of the speech involved: "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges v. California,* 314 U.S. 252, 269, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

The decisions of this Court show that the First Amendment extends not only to speech that concerns how we govern ourselves, but also to speech that concerns how we conduct ourselves in our personal and social lives, down to the most intimate details. In *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952) this Court recognized that motion pictures, even though they are designed to entertain as well as inform, were entitled to First Amendment protection. 343 U.S. at 501. In *Bigelow v. Virginia,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) this Court provided First Amendment protection for advertisements for abortion clinics, recognizing that the advertisement "conveyed information of potential interest and value to a diverse audience." 421 U.S. at 821. And in *Carey v. Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) this Court recognized that contraceptive advertising was protected First Amendment expression. Perhaps most telling against Petitioners' argument is this Court's observation in *Carey* that "At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." 431 U.S. at 701. The Court of Appeals appropriately disposed of the argument of Petitioners and *amicus curiae* for differentiation on the value of speech with the observation that

> Such an endeavor would not only be hopelessly complicated but would raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality. If the shield of the first amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can

> be identified as 'bad,' all free speech becomes threatened.

814 F.2d at 1024.

Petitioners try to avoid the principles of *Brandenburg* because it involved a criminal action, not a civil claim. But, as already noted, *Brandenburg* articulated the requirements to punish otherwise protected speech, and whether the State punishes speech by criminal sanctions or by allowing civil recovery, it is still censorship. In applying *Brandenburg* in this civil action, the Court of Appeals relied on this Court's observation in *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964): "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." 376 U.S. at 277. *See Walt Disney Productions, Inc. v. Shannon,* 247 Ga. 402, 276 S.E.2d 580, n.1. (1981), ("For First Amendment purposes, whether an utterance is suppressed under criminal law or penalized under tort law makes no difference.") The Court of Appeals correctly held that *Brandenburg* and *Hess* cannot be discounted merely because they concerned criminal sanctions, because if the State cannot constitutionally punish Respondent's speech with criminal sanctions, it cannot constitutionally do so by allowing civil tort recovery.

Petitioners are then left with the naked argument that the article is dangerous and should not have been published. The Court of Appeals was correct in rejecting this as a basis for decision. Just because speech contains provocative or dangerous ideas does not mean it loses constitutional protection. This is the essence of the First

Amendment. As Justice Harlan observed in *Cohen v. California:*

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. *See Whitney v. California,* 274 U.S. 357,375-77 (1927) (Brandeis, J., concurring).
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons,' *Winters v. New York,* 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting), and why 'so long as the means are peaceful, the communication need not meet standards of acceptability,' *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971).

403 U.S. 15, 24-25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). The Court of Appeals properly protected this interest in its ruling, and its decision should not be disturbed.

———o———

CONCLUSION

The Court of Appeals properly applied this Court's analysis in *Brandenburg* and *Hess* in determinig that the article at issue was constitutionally protected speech that could not serve as the basis for a civil action for wrongful death. The Court of Appeals properly held that Petitioners had not preserved any other ground to support the judgment and that if they had, that ground would have been constitutionally deficient. The Court of Appeals' holding should not be disturbed.

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APPENDIX A

Editor's Note: HUSTLER emphasizes the often-fatal dangers of the practice of "auto-erotic asphyxia," and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose.

• • •

Many sexual pleasures have remained hidden for too long behind the doors of fear, ignorance, inexperience and hypocrisy. In keeping with HUSTLER's belief that the repression of natural and healthy urges is physically and emotionally damaging, we present this series of informative articles to increase your sexual knowledge, to lessen your inhibitions and—ultimately—to make you a much better lover.

ORGASM OF DEATH

by Richard Milner

Bobby L. was a bright, fun-loving and seemingly well-adjusted teenager. He got along well with his classmates in a New York City high school, and was never considered the type who would take his own life.

Yet one tragic day his parents found him dead in his bedroom, hanging from a homemade noose attached to the clothes pole in the closet. There were pictures of nude women near his body, and his penis was still dribbling semen. When the coroner arrived, the parents begged him to list the cause of death simply as a "fatal accident."

In recent years Masters and Johnson and other researchers have shown ordinary self-stimulation of the sex organs to be a harmless practice that induces a temporary state of euphoria and physiological release. And Dr. Alfred Kinsey's surveys disclosed that virtually all healthy males and females do it.

But Bobby's method of masturbation was neither healthy nor harmless. As many as 1,000 youngsters—mostly males—die every year in this country by hanging themselves while masturbating. Coroners call the practice "auto-erotic asphyxia" or the "adolescent sexual-asphyxia syndrome"—when they describe it at all.

Typically, the practitioner rigs up a noose—often a rope or a belt—and cuts off his air supply at the height of sexual excitement. The brain, deprived of oxygen, experiences a "high" accompanied by giddiness, light-headedness and exhilaration. Often the practitioner will pass out for a few minutes, then revive. Sometimes, though, he never comes out of it!

Dr. Robert Stein of the Cook County (Illinois) Medical Examiner's Office cites 15 to 20 cases of this latter instance each year in the Chicago area alone. The victims, who usually have ejaculated, are discovered with nooses around their necks. According to Dr. Stein (as quoted in the *Chicago Tribune*), "Great efforts are taken to cover up these cases, and many coroners and medical examiners go along to lessen embarrassment to families" who don't want the true circumstances of death revealed.

For years there was some confusion among medical examiners and insurance companies as to whether these deaths were to be considered accidental or suicides. In an article published in the *Journal of Child Psychiatry*, Stephen Rosenblum and Dr. Myron Faber of San Diego's Balboa Naval Hospital conclude the deaths are really accidental—because the victims have no intention of killing themselves.

Indeed, here lies the real danger of the practice. While it may seem a cheap and easy way of getting "kicks," it is a serious—and often-fatal—mistake to believe that asphyxia can be controlled.

The critical error is to believe that, as long as you don't actually choke yourself (compress the windpipe), you can always regain consciousness. In fact, a little too much pressure on the neck, and you get the barocepter reflex (which refers to little valves in an artery that halt the flow of blood when pressure is applied to the vessel).

This reflex—in the case of the main artery supplying blood to the head, the carotid—leads to rapid unconsciousness, and the victim may then fall on his noose or belt in such a way as to produce hanging and asphyxia, resulting in death. Of course, he will be unaware of this new danger—since he is not conscious.

Vaughn Bode, the creator of the cosmic comic strip "Cheech Wizard," which appeared monthly in *High Times* magazine, died at the age of 33 because of his auto-erotic sexual practices. He was found in his bedroom with his neck through a homemade noose, his genitals exposed.

Later, friends and relatives found more than a hundred empty bottles of butyl nitrite in Bode's room, and they suspect this commonly available legal drug was also implicated in the death. "Vaughn did anything that would get him higher," said a friend. "He snorted these dangerous drugs, used rubber and nooses, put on women's clothing—everything he could think of. And his methods underwent an evolution. He'd mask his eyes, put plugs in his ears, deprive himself one by one of outward sensations. It became a spiritual thing

Illustration by David Mann

App. 1

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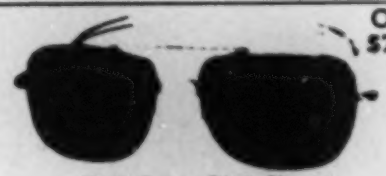

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for him. After a while, he didn't even masturbate—just went after the high."

Of course, yogis and Eastern mystics have long known how to alter consciousness by changing or constricting normal breathing. But Bode hadn't the patience for gradual practices. He wanted immediate gratification, as do many who pursue quick and dangerous highs. "Usually Vaughn came out of it okay after five minutes," his friend recalls. "He always said he just needed to have a chat with the Big Man—'The Management,' he called it. It was a form of spiritual Russian roulette."

Another reported case—this one dealing with the experience of an anonymous 15-year-old male—was recalled by Dr. Faber in the *Journal of Child Psychiatry*. Fortunately, the doctor learned about the youth's habit early enough, and was able to arrange psychotherapy sessions that successfully altered his destructive behavior.

This description is based on Faber's interview with the teenaged patient: "He strips completely, puts on various articles of female clothing (most commonly a bra and panties) and views a large assortment of sexually explicit magazines. He then loops his belt through its buckle, places the loop around his neck and over the clothes pole in his closet, and holds the belt in his other hand. Since he is 5-5, and the clothes bar is exactly four feet from the ground, he *must* lift his legs to be able to hang himself.

"He always places a towel around his neck before putting the belt over it, in order to avoid producing any marks or bruises. . . . Hanging is accomplished for one-half to two minutes and almost without exception is accompanied by ejaculation. Initially, he hanged himself once every other week, but most recently has done it as often as two to four times a week."

One factor pops up again and again in these cases—the use by men of female undergarments or intimate apparel. The relationship between transvestite practices—cross-dressing—and sexual asphyxiation is not clear. Some psychotherapists have attempted to link erotic hangings to early childhood fascination for ropes and chains, to binding with women's undergarments, and to the whole spectrum of adult bondage and sadomasochism.

It has long been known that tying or binding various parts of the body can be sexually stimulating. As pioneer sex researcher Havelock Ellis put it, "Any restraint upon muscular and emotional activities generally tends to heighten the state of sexual excitement." Erotic bondage is also connected to psychological games of sexual aggression, submission and domination. But the basic physiological responses produced by being tied or restrained become sexual in themselves. Alex Comfort writes in *The Joy of Sex*, "Our cultural taboo on all intense extragenital sensations" makes them all the more exciting.

Students of the controversial psychiatrist Wilhelm Reich explain the pleasure of constriction in terms of its effect on "body armoring." Reich believed thoughts, feelings and experiences become "frozen" in our postures and physical attitudes. The slump of a neck, the pattern of breathing, the way the spine is held—all reflect the defensive layers we have accumulated around our private, inner cores.

It is not without reason that the French term for orgasm is *le petit mort*—the "little death." During moments of orgasm the ego ceases to exist. There is no "I"—only an overpowering feeling of pleasure and oblivion, not unlike the high produced by drugs or some religious rites. Death and orgasm are literally connected too. It has been known for centuries that executed criminals are often observed to ejaculate at the point of death.

One recent study of the relationship between bondage and suicide reported "self-asphyxiation is a common component . . . in the bondage syndrome. Most bondage practitioners know about hanging thrills, but are frightened and stay away from this obvious danger to life. Several said they are saving hanging for the ultimate scene, or eventual suicide."

Such awareness of the danger of death marks a difference between adults and youngsters who contemplate strangulation as a means of getting off. Older people know they are flirting with death; teenagers may think it's just a cheap high that won't harm them any more than a ride in a fast car. Youngsters who practice it tend to be heterosexual experimenters, while older practitioners tend to be gay or bisexual individuals who seek out partners in order to reduce the risk. There are few reported instances of women dying from auto-asphyxiation, but they do exist—about one in every 50 cases.

It's a fact: People practicing this form of sexual stimulation *do* kill themselves. Recognizing the syndrome early is one way to stop a friend or relative before he or she takes the ultimate one-way trip. But it is also important to know—beyond a doubt—that auto-asphyxiation is one form of sex play you try only if you're anxious to wind up in cold storage, with a coroner's tag on your big toe.